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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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INDEX

PAGE

Citation To The Opinion Below 2

The Grounds On Which The Jurisdiction Of This Court Is Invoked 2

Constitutional And Statutory Provisions Involved 2

Reasons Relied On For Allowance Of A Writ Of Certiorari 3

Questions Presented For Review 6

Statement Of Facts 8

Argument 12

I.

There Should Be No "Assumption Of Truthfulness" Instruction Given In Criminal Prosecutions; This Instruction Invades The Preserve Of The Presumption Of Innocence, Does Not Correctly State The Law, And Is Prejudicial To The Defendant Whether Or Not He Testifies 12

II.

The Definition Of "Misapply" And "Misapplication" As Given In This Case Will, If Correct Leave The Statute So Vague Of Meaning As To Be Unconstitutional 14

III.

The Crime Of Misapplication Should Require An Intent "To Injure *And* Defraud"; The Court Of Appeals Held That It Required Only The Intent To "Injure Or Defraud" 18

IV.

The Conduct Of The United States Attorney, And The Approval Thereof By The Court Of Appeals, Should Be Subjected To The Supervisory Powers Of This Court 21

Conclusion 23

Appendix—(Opinion of the United States Court of Appeals 1a-13a

LIST OF AUTHORITIES CITED

Cases:

Berra v. United States, 351 U.S. 131, at 134 (1956) 15
Connally v. General Construction Co., 269 U.S. 385 (1926) 17
Ferguson v. United States, 112 F. 2d 132 (5th Cir. 1940) 19
Griffin v. California, 380 U.S. 609 (1965) 12
Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) 22
Jerome v. U. S., 318 U.S. 101 17
Johnson v. United States, 95 F. 2d 813 (4th Cir. 1938) 19, 20
Marshall v. United States, 360 U.S. 310 (1959) 22
Morisette v. United States, 342 U.S. 246 (1952) 20

Ohio Bldg. Safety Vault Co. v. Industrial Board of Illinois, 277 Ill. 96, 115 N.E. 149, at 154 (1917) 13
State v. Berlovich, 220 Iowa 1288, 1294-95, 263 N.W. 853, 856 (1935) 13
U. S. v. Brewer, 139 U.S. 278 (1891) 17
United States v. Britton, 107 U.S. 655 (1882) 18, 20
United States v. Cohen Grocery Co., 255 U.S. 81 (1921) 15, 16
United States v. Dichiarinte, 385 F. 2d 333 (7th Cir. 1967) 12
United States v. Evans, (Third Circuit Court of Appeals, June 27, 1968) 13
United States v. Hickey, 360 F. 2d 127 (7th Cir. 1966) 19
United States v. Hinze, 183 Fed. 907 (S.D. N.Y. 1909) 19
United States v. Johnson, 371 F. 2d 800 (3rd Cir. 1967) 12, 13
United States v. Martindale, 146 Fed. 280 (D.C. Kan. 1903) 19
United States v. Meisch, 370 F. 2d 768 (3rd Cir. 1966) 13, 14
United States v. Norton, 188 Fed. 256 (E.D. Okla. 1911) 19
United States v. Reed, 376 F. 2d 226 (7th Cir. 1967) 22
United States v. Wiggenhorn, 312 F. 2d 289 (9th Cir. 1963) 19

Others:

Wigmore on Evidence, Vol. 2, Sec. 650 (3rd Edition) 14
Title 18, U.S.C. 657 18

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your Petitioner, Howard B. Quinn, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in this cause on July 24, 1968, and thereafter corrected on August 28, 1968. The Petition for Rehearing was denied on August 29, 1968.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit printed in the Appendix attached hereto, infra, pages 1a-13a, is unreported at the present.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment V to the Constitution of the United States provides as follows: (in relevant part)

> "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

Title 18, U.S.C. Section 657 provides in relevant part as follows:

> "Whoever, being an officer . . . of . . . any . . . savings and loan . . . association . . . the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, purloins or wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined . . . or imprisoned . . .".

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

1. There is a conflict between the decisions of the United States Court of Appeals for the Seventh and Third Circuits on the propriety of the instruction on the subject of the "assumption of truthfulness" or "presumption of truthfulness" in criminal cases, *United States* v. *Evans,* June 27, 1968, No. 16751 (Third Cir. 1968) (not yet published); *United States* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967); and *United States* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966), hold such an instruction to be reversible error. This cause (Appendix, page 1a et seq.); *United States* v. *Schwartz,* July 1968, No. 16465 (7th Cir. 1968); and *United States* v. *Roviaro,* 379 F. 2d 911 (7th Cir. 1967) hold the instruction not to be reversible error, and, in the opinion below, it is held proper where the Defendant testifies, in direct contradiction to *United States* v. *Evans,* June 27, 1968, No. 16751 (3rd Cir. 1968). This conflict should be resolved; until it is resolved, Defendants tried in the Seventh Circuit must face an instruction which is most prejudicial, and which is not faced by men accused of like crimes being tried in the Third Circuit. Federal law on this point is not uniform, and the instruction itself invades the presumption of innocence, which is one of the rights protected by due process of law.

2. A definition of the crime of "misapplication" as the "unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association", without any definition of what is meant by "unlawfully" does not make sense, is so

vague as to be unconstitutional, provides no ascertainable standard of guilt, and violates the holdings of this Court in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921), and *Lanzetta* v. *New Jersey*, 306 U.S. 618 (1939), and is in conflict with the law on the question of the vagueness of statutes as it stands in the Ninth Circuit. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962). This instruction, which is commonly given in the Seventh Circuit, See *United States* v. *Hickey*, 360 F. 2d 127 (7th Cir. 1966) should be held bad, or, if it is the only definition of misapplication that can be given, the statute should be held to be unconstitutional.

3. A definition of the crime of "misapplication" which can only recite that it is an "unlawful" taking or conversion, without amplification, is not a full definition of the crime, and leaves it to the jury to decide whether or not the "taking" of the money was "unlawful". An interpretation of a statute which can only say that it forbids an "unlawful taking" leaves it to the jury to apply the law to the facts with no more standard than the jury's view of what the law should be. This creates a variable standard which would vary from one district to another and from one jury to another, and is in conflict with the holdings of this court, which require that the federal criminal laws be of universal and uniform application. *Jerome* v. *United States*, 318 U.S. 101 (1943); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921); *United States* v. *Brewer*, 139 U.S. 278 (1891). This is a statute of frequent use, and the formulation of a fair and uniform definition of the proscribed conduct should be a benefit to the development of the law. This case, as presented, raised this issue squarely, and the facts are

sufficiently close on the merits that the instruction, if held to be inadequate, was necessarily prejudicial.

4. The instructions given to this jury would allow conviction upon proof of intent to injure or upon proof of intent to defraud the association. The last direct holding of this Court on this point was in *U. S.* v. *Britton*, 107 U.S. 655 (1882), when similar statutory language applicable to national banks was held to require *both* an intent to injure and an intent to defraud. Since the *Britton* case, the Courts of Appeal have come to consider that the intent need not include an intent to defraud. This allows conviction upon proof of intent "to injure" alone, which is a much lower standard than the combination of "intent to injure and defraud". The standard of guilt has been lessened by the actions of the lower Federal Courts over a long period of years, without authority from Congress. This change in the law is brought into focus in this case because it is entirely possible that this jury may have found only the intent to injure upon the facts as presented to them, although most cases decided under Title 18, U.S.C. 657, involve both elements of the crime in abundance. We submit that this point needs definition, and that this would be an appropriate case for such definition.

5. The trial court denied a mistrial after the Assistant United States Attorney made a statement in the form of a question which put before the jury the fact that the Association which had made the prepayment of rent had failed. This fact was immaterial, wholly prejudicial, and deprived the Defendant of a fair trial. The denial of the motion for mistrial, which was affirmed by the Court of Appeals, was, we suggest, a departure from the usual course of judicial proceedings such as should call for an exercise of the supervisory powers of this Court.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the instruction given to the jury on the subject of the "assumption of truthfulness" with respect to all witnesses dilute the presumption of innocence which is guaranteed to the Defendant by the Fifth Amendment to the Constitution.

2. Does a definition of "misapplication" of the funds of savings and loan associations become unconstitutionally vague when it is presented to the jury as "the unlawfully (sic) taking or conversion by a person to his own use of the money or funds of an insured savings and loan association", without further definition of "unlawfully" or "unlawful" and without definition of "conversion".

3. Is the instruction quoted in Question 2 a correct definition of the crime "misapplication", as created by 18 U.S.C. 657.

4. Is the intent required for conviction under Title 18, U.S.C. Section 657 the intent to "injure and defraud" the association, as held in *U. S.* v. *Britton,* 107 U.S. 655 (1882), or the intent to "injure" *or* "defraud" as held by the Seventh Circuit Court of Appeals in this case and in *U. S.* v. *Hickey,* 360 F. 2d 127 at 144 (7th Cir. 1966), cert den. 385 U.S. 928 (1966).

5. Whether, in the exercise of its supervisory powers, this Court should reverse on the ground that Quinn was deprived of a fair trial by the prosecutor when he asked Quinn, as the last question in the case,

"When did Beverly Savings and Loan Association close, Mr. Quinn?"

This question was used to inform the jury that the association which had made a four year prepayment of rent in the amount of $553,166.00 had failed. This fact was not previously before the jury. The jury was instructed to disregard the question, but a mistrial was denied, and the conviction followed and was affirmed.

STATEMENT OF FACTS.

The petitioner, Howard Quinn, was the chairman of the Board of the Beverly Savings and Loan Association. He also had the equitable ownership of the building in which the association was located. In March, 1963, he advised his Board of Directors that he was contemplating taking a prepayment of rent of four years against the lease which the association had with himself as landlord. In early April, 1963, he took a check for the four year prepayment, which amounted to $553,166.66 after deduction of discount. The prepayment was not concealed, but did not have the specific authority of the Board of Directors. The Association did not thereafter pay rent, and, when the Board of Directors voted to reconsider the payment, Quinn returned $53,166.66.

Quinn was indicted for misapplication of funds of an insured savings and loan association under Title 18 U.S.C. Sec. 657, for the prepayment of rent and for another act not here in question. He was also indicted in two Counts for violating Title 18 U.S.C. 1006 in committing the same acts, and was originally convicted under all counts. That conviction was reversed as to the two counts under Title 18 U.S.C. 1006, and reversed and remanded for separate trials under the two separate charges of misapplication. *U. S.* v. *Quinn,* 365 F. 2d 256 (7th Cir. 1966). The prepayment of rent charge resulted in the conviction and affirmance, the review of which is sought in this petition. The trial on the remaining count resulted in a directed verdict of acquittal entered after a hung jury.

The Government proved that Quinn was in financial difficulties at the time, and allowed the jury to learn,

by a question of the trial counsel for the Government which the jury was told to disregard, that the Association had closed after the prepayment. A motion for mistrial was denied, and the statement of counsel, and its harmful effect, were held not to be error by the Court of Appeals.

The trial judge noted that there was little conflict in the testimony, and that the case was close on the facts. (Transcript 694 and 705).

At the conclusion of all the evidence, which included the testimony of Mr. and Mrs. Quinn, the trial court held the required conference on instructions, and advised counsel that he would give the instruction found in Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F. D. 67-68 (1961). (Instruction 3.01), with a substitution of the word "assumption" for "presumption". The instruction as given was as follows: (Transcript 801):

> "If you find the assumption of truthfulness with respect to all witnesses who are sworn to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Objection was made on the ground that the "assumption" of truthfulness is, of necessity, in derogation of the presumption of innocence, and the authority of *U. S.* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967) was cited. (Transcript 716-717). The objection was overruled, and the instruction above was given with the usual instruction to the effect that the jury could consider the "interest" of any witness in the outcome of the case. (Tran-

script 803). The only witnesses with any direct interest in the outcome of the case were the Defendant and his wife.

The jury was also instructed, as to the meaning of the word "misapplication" only as follows: (Transcript 811):

> "What does misapplication or misapply mean? As used in the statute and as used in this indictment, it means the unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association."

A request that "unlawful", as used in this context, be defined, and a tendered instruction, were overruled and refused. (Transcript 722). A tendered instruction that "there is nothing unlawful, as a matter of law, about the prepayment of rent" was also refused. (Record 58, Transcript 722). Specific objection was made to the instruction at the proper time, and instructions were offered, and refused, which attempted to define "misapply". (Record 55 and 57).

On the question of the requisite intent required for a conviction of "misapplication", the Defendant offered an instruction which described the intent as that to "injure and defraud" the association. (Defendant's tendered instruction 27, Record 57). The Government offered an instruction which defined the burden of proof as requiring only that it show the Defendant acted "with intent to injure or defraud the Association." (Transcript 811).

Defendant's counsel cited *U. S.* v. *Britton,* 107 U.S. 655 (1882) to the trial court, and argued that the requisite intent is the intent to "injure and defraud" as stated by that case, and not the intent to "injure *or* defraud." (Transcript 718). This objection was overruled.

The Defendant's counsel also argued, both at the conference and in a motion in arrest of judgment, that the misapplication statute (Title 18 U.S.C. Section 657) was, as interpreted by the trial court, unconstitutional and void for vagueness under Amendment V to the Constitution of the United States. This point was overruled each time it was raised.

The post-trial motion filed within the required time was denied, as was the motion in arrest of judgment. Each of the points raised in this petition (set forth as the questions presented for review) were raised in the trial court and before the United States Court of Appeals for the Seventh Circuit, and each was overruled in the opinion which is Appendix A to this petition.

ARGUMENT.

I.

THERE SHOULD BE NO "ASSUMPTION OF TRUTHFULNESS" INSTRUCTION GIVEN IN CRIMINAL PROSECUTIONS; THIS INSTRUCTION INVADES THE PRESERVE OF THE PRESUMPTION OF INNOCENCE, DOES NOT CORRECTLY STATE THE LAW, AND IS PREJUDICIAL TO THE DEFENDANT WHETHER OR NOT HE TESTIFIES.

Certain of the trial courts in the Seventh Circuit generally instruct the jury, in criminal cases, that there is an "assumption of truthfulness with respect to all witnesses", even though that Court of Appeals has, at least once, implied disapproval. *United States* v. *Dichiarinte*, 385 F. 2d 333 (7th Cir. 1967). The instruction was given in this cause on the Court's own motion, and the record would indicate that it was anticipated, because defense counsel was prepared to cite *United States* v. *Johnson*, 371 F. 2d 800 (3rd Cir. 1967) when the trial court indicated that it would be given. (Transcript 716, 717).

This instruction puts a burden on the Defendant to testify, when he might otherwise decline the stand, because it puts an unnecessary and unreliable halo around the heads of the Government witnesses. To that extent, the instruction may be considered defective in the light of the *Griffin* case, which insulates a Defendant against improper trial compulsion to testify. *Griffin* v. *California*, 380 U.S. 609 (1965).

When the instruction is given after the Defendant has testified, as here, it creates an "assumption" or "pre-

sumption" that all witnesses speak the truth *except* those with an interest in the outcome of the case.[1] The Defendant, as the general instructions are required to say, must have his testimony viewed in the light of his own interest in the outcome of the case, (Transcript 801). Thus the assumption is easily destroyed as to the Defendant, and, in this case, as to his wife, who was a material witness. It remains of benefit to the Government witnesses, who are not generally directly interested in the outcome of prosecutions, and were not so interested in this case.

In *United States* v. *Evans,* decided in the Third Circuit Court of Appeals on June 27, 1968, and not yet reported, the defendants testified in their own behalf, but the instructions recited that "ordinarily it is assumed that a witness will speak the truth". No objection was made to the instruction at the trial, and the Government argued that any error was waived. It was one of the factors in the reversal of the conviction. The court pointed out the confusion which the "assumption" is likely to cause in the minds of the jury, especially when considered with the other presumptions which arise in such a case.

In other cases decided in the Third Circuit, the instruction was held to be reversible error where the Defendant did not testify. *United States* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967); *United States* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966). The criticism of the instruction

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[1] An "assumption" and a "presumption" are the same thing when used in this context. See *Ohio Bldg. Safety Vault Co.* v. *Industrial Board of Illinois,* 277 Ill. 96, 115 N.E. 149, at 154 (1917); *State* v. *Berlovich,* 220 Iowa 1288, 1294-95, 263 N.W. 853, 856 (1935).

in the *Meisch* case goes to its reasonableness as an expression on the subject of human fallibility; quoting Wigmore on Evidence, Vol. 2, Sec. 650 (3rd Edition), the court said: (370 F. 2d at 773):

> "Hence, a witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows."

Defendants facing trial in the Seventh Circuit must now consider, in the light of the opinion below, that they will face the "assumption of truthfulness" whether they testify or not, and must make their decision to testify in the light of that instruction. If they choose to testify, they have their own testimony judged by traditional considerations of interest, but the Government witnesses have the benefit of the "assumption". If they do not testify, then the Government witnesses are blessed with an "assumption" which vitiates the "presumption" of innocence. The opposite is true in the Third Circuit, where the instruction is always error. This conflict between the circuits is most plain, and should be resolved. This case presents an excellent opportunity for its resolution because the point was properly raised, the Court of Appeals approved the instruction, and the facts were sufficiently close that there can be little question but that prejudice resulted.

II.

THE DEFINITION OF "MISAPPLY" AND "MISAPPLICATION" AS GIVEN IN THIS CASE WILL, IF CORRECT, LEAVE THE STATUTE SO VAGUE OF MEANING AS TO BE UNCONSTITUTIONAL.

The crime of misapplication was defined by the trial judge to the jury in this language:

". . . the unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association."

No other definition was offered, except that the question of intent was defined as the "intent to injure or defraud".

This definition does not, we submit, amount to a constitutional definition of a crime such as would allow a jury to apply the law to the facts; it amounts only to the court telling the jury that, if the jury should find that the prepayment of rent was unlawful, then the jury might convict; no instructions were given to the jury on the question of prepayments of rent or on the question of the legality thereof. An instruction was tendered (Record 58), which would have told the jury that there was "nothing unlawful as a matter of law about the prepayment of rent." That instruction was refused, and the jury was left to speculate on the various questions of corporate law that arise from an analysis of Defendant's open conduct in taking a prepayment of rent. See *Berra* v. *United States,* 351 U.S. 131, at 134 (1956).

If this instruction is a correct statement of the crime of "misapplication", then the statute itself is in conflict with *United States* v. *Cohen Grocery Co.,* 255 U.S. 81 (1921).

Involved in the *Cohen* case was a statute which provided in substance as follows: (255 U.S. at page 86)

"That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person . . . (e) to exact excessive prices for any necessaries . . . any person vio-

> lating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000.00 or be imprisoned for not more than two years or both."

The Defendant, a grocer, dealt in sugar and other necessaries, and apparently sold sugar at a price as high as $19.50 for a hundred pound bag, which was considered by the jury to be excessive.

This court, at 255 U.S., page 89, concluded that the statute so obviously failed to set up an ascertainable standard of guilt, and was so obviously inadequate to inform persons accused of violation of the nature and cause of the accusation, that the statute was unconstitutional. The Court went on to say:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

To the same effect, the misapplication statute, Title 18, U.S.C. Section 657, renders it unlawful to commit a "misapplication" of funds. This could be defined with some definitiveness, and alternative instructions were offered

at the trial below which attempted to do so. The trial court felt, however, that it was enough to say only that it was necessary to prove an "unlawfully taking or conversion", and it was left to the jury to decide what taking might be unlawful. "Conversion", a word of art to lawyers, was not defined. We suggest that there is no substantial difference between allowing a jury to decide what is "unlawful" and allowing a jury to decide what is "unreasonable". See also *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

There is a substantial body of Illinois corporate law to which reference could be made to decide whether or not the prepayment of rent in this case was "unlawful". The trial judge made no attempt to refer to that law, and refused the only instruction tendered on the subject. However, even if the trial courts throughout the country attempted to instruct juries as to the local law relating to the locally unlawful nature of transactions characterized as "misapplications", then they would be faced with *Jerome* v. *U. S.*, 318 U.S. 101, and *U. S.* v. *Brewer*, 139 U.S. 278 (1891). These cases hold, in substance, that federal criminal law must remain uniform, and cannot vary from state to state.

We suggest, most respectfully, that it is unjust, and a violation of the due process clause of the Fifth Amendment, to give to a jury the right to decide what conduct shall be "unlawful". Due process does not mean that the jury should define the law; we suggest that it has always been the law that juries do *not* define the law.

These objections were timely made at the trial and in the Court of Appeals. The matter is squarely presented here upon a record which involves an act which cannot

be construed as a "purloining" or "abstraction" or "embezzlement". See Title 18, U.S.C. 657. There are many transactions which are none of those things, but which may be subject to some question, and which could lead to a prosecution. If these transactions are to be judged in the light of what a lay jury says is "unlawful", then there can be no rational basis for uniformity from one case to the next as to what set of facts constitute misapplication.

We submit that the public is entitled to more notice of what is criminal than a simple statement that it is a crime to "take unlawfully" in a manner that is neither an embezzlement, an abstraction, nor a purloining, and which need not involve an intent to defraud.

III.

THE CRIME OF MISAPPLICATION SHOULD REQUIRE AN INTENT "TO INJURE AND DEFRAUD"; THE COURT OF APPEALS HELD THAT IT REQUIRED ONLY THE INTENT TO "INJURE OR DEFRAUD".

The first misapplication statute was applicable only to national banks, and it came before this court in *United States* v. *Britton,* 107 U.S. 655 (1882). Its language was similar to Title 18 U.S.C. Section 657. The question was raised as to the intent required to prove the crime. The Court defined that intent in this language, at Page 668:

> ". . . the intent to injure and defraud is an essential ingredient to every offense specified in this section, and the failure to aver the intent is a fatal defect in the counts in which it occurs."

The *Britton* case has been followed at times, and the requirement of an intent both to injure and to defraud

has been required in certain cases. *United States* v. *Hinze,* 183 Fed. 907 (S.D. N.Y. 1909); *United States* v. *Martindale,* 146 Fed. 280 (D.C. Kan. 1903); *United States* v. *Norton,* 188 Fed. 256 (E.D. Okla. 1911); *Johnson* v. *United States,* 95 F. 2d 813 (4th Cir. 1938); cf. *Ferguson* v. *United States,* 112 F. 2d 132 (5th Cir. 1940); *United States* v. *Wiggenhorn,* 312 F. 2d 289 (9th Cir. 1963).

In another series of cases, which have arisen without the benefit of precedent in this court, the requirement has been only that there be an intent to injure *or* defraud. For example, see *United States* v. *Hickey,* 360 F. 2d 127 (7th Cir. 1966).

The opinion of the Court of Appeals in this case made it plain that the *Hickey* case was the precedent to follow, (See opinion of the court below, Appendix 1 (a), Point 2), and that the *Britton* case was of less vitality than its own recent precedent.

The trial court framed this point most clearly at Transcript, page 720, where the following appears:

> "Mr. Collins: But misapplication requires an element of fraud in order to be a misapplication, I believe.
>
> The Court: I don't think so."

The lower federal courts thus have rejected a holding of this court which has never been overruled or seriously distinguished. We seek certiorari in order that this court may determine whether or not the *Britton* case still has validity in the light of the *Hickey* case and the other lower federal cases which hold that the intent required in a misapplication case allows conviction on proof of intent to injure alone, without proof of intent to defraud.

This distinctive holding is, we submit, contrary to the meaning of *Morisette* v. *United States,* 342 U.S. 246 (1952).

This point is of importance here because Quinn, with this prepayment of rent, may well have been found guilty by a jury which believed only that the prepayment of rent was injurious, and was known by Quinn to be injurious. Hic acts were done openly, and there may well have been no finding of intent to defraud. A crime sufficiently serious to be bracketed with the words "embezzles, abstracts, purloins", should not be considered to be a crime requiring no specific criminal intent to defraud. 18 U.S.C. Section 657.

In *Johnson* v. *United States,* 95 F. 2d 813 (4th Cir. 1938), the joint intent requirement was set forth as requiring that "fraud must be found and some conversion of the funds of the bank to the use or gain of the person charged or of some person other than the bank." That holding is specifically contrary to the holding of the Seventh Circuit in this case.

We suggest that there is a plain conflict on this point between the Seventh Circuit on one side and the Fourth Circuit on the other. Further, *United States* v. *Britton, supra.,* 107 U.S. 655 (1882), makes good sense today when read with *Morisette* v. *United States,* 342 U.S. 246 (1952) in mind. Certiorari should, we submit, issue both to bring the Seventh Circuit into conformity with the holding of this Court and to permit this Defendant to have a fair trial at which a jury would be obliged to face a decision on the question of his "intent to defraud".

IV.

THE CONDUCT OF THE UNITED STATES ATTORNEY, AND THE APPROVAL THEREOF BY THE COURT OF APPEALS, SHOULD BE SUBJECTED TO THE SUPERVISORY POWERS OF THIS COURT.

At the conclusion of the recross examination, after redirect examination of the Defendant, the United States Attorney prosecuting this case asked the question:

> "When did Beverly Savings and Loan Association close, Mr. Quinn?"

This question (Tr. 675), was asked after a long and difficult trial, which, to the trial court, then appeared to be close on the merits.[2]

This question was justified by the Court of Appeals on the ground that the United States Attorney perhaps "should have been more careful", but that, having faith in the jury system, the question should not be considered prejudicial in the light of the fact that the defense had tried to prove that Quinn had been head of the association during a long period of growth.

The objection to the question was, of course, sustained, as the failure of the savings and loan association was not an issue, was not material, and had no relevance to the question of guilt or innocence. However, the motion for mistrial was denied, and the opinion of the Court of Appeals tends to indicate that the failure of a financial institution is a relevant fact in the prosecution of one of its officers for a misapplication of its funds.

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[2] (Tr. 705—trial court, at close of all evidence, indicated that he was at "sixes and sevens on this question of whether there is sufficient evidence to establish an intent to defraud.").

Most plainly, one can embezzle from a solvent institution and be honest with an insolvent institution, and this point has no relevance whatsoever in a prosecution under any phase of Title 18, U.S.C. 657.

This is the same kind of point that arises when evidence of other crimes, or of prejudicial news information, reaches the jury. See *Marshall* v. *United States,* 360 U.S. 310 (1959); *United States* v. *Reed,* 376 F. 2d 226 (7th Cir. 1967). It would be no more correct to mention the failure of a savings and loan association than it would be to mention some other accusation that had been made against Quinn. See *Himmelfarb* v. *United States,* 175 F. 2d 924 (9th Cir. 1949).

The Court below attempted to justify this conduct on the part of the assistant United States Attorney by excusing him on a theory of "entrapment". It is plain from the record that the Assistant thought it to his advantage to ask the question, and that he therefore asked it. We believe that it had a great deal to do with obtaining a conviction in a close case.

The question was plainly improper, and such was the ruling of the trial court, which made an effort to cleanse the minds of the jury of this gross impropriety. The case was close, however, and the justification for the question was slender, and such tactic as this should not become enshrined as a precedent for like conduct in the future. This is neither fair nor correct, and the supervisory powers of this court should, we submit, be exercised to correct the lower courts, and to permit to the Defendant that fair trial which he is guaranteed by the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

For the reasons which we have stated, we respectfully pray that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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